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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

NEW JERSEY CHAMBER OF COMMERCE; CHEMICAL INDUSTRY COUNCIL OF NEW JERSEY; NEW JERSEY BUSINESS AND INDUSTRY ASSOCIATION; CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION, INC.; MERCK & CO., INC.; MAGNESIUM ELEKTRON, INC.; C.P. CHEMICALS, INC.; EXXON CHEMICAL AMERICAS, a division of EXXON CORPORATION; SCHERING CORPORATION; ESSEX CHEMICAL CORPORATION; INGERSOLL-RAND COMPANY; AND SHELL CHEMICAL COMPANY, a division of SHELL OIL COMPANY, *Petitioners*,

v.

ROBERT E. HUGHEY, Commissioner of Environmental Protection; J. RICHARD GOLDSTEIN, M.D., Commissioner of Health and WILLIAM VAN NOTE, Acting Commissioner of Labor and THE STATE OF NEW JERSEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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May 15, 1989

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

1. Whether the in-plant labeling provisions of the New Jersey Worker and Community Right To Know Act are expressly preempted by the Occupational Safety and Health Act of 1970 and the Occupational Safety and Health Administration's Hazard Communication Standard and Revised Hazard Communication Standard.

PARTIES TO THE PROCEEDING

The petitioners are identified in the caption of this case.* The parties in the Court below were:

New Jersey Chamber of Commerce; Chemical Industry Council of New Jersey; New Jersey Business and Industry Association; Chemical Specialties Manufacturers Association, Inc.; Merck & Co., Inc.; Magnesium Elektron, Inc.; C.P. Chemicals, Inc.; Chem-Mark, Inc.; Exxon Chemical Americas, a division of Exxon Corporation; Schering Corporation; Essex Chemical Corporation; Ingersoll-Rand Company; and Shell Chemical Company, a division of Shell Oil Company; Plaintiffs below;

Robert E. Hughey, Commissioner of Environmental Protection; J. Richard Goldstein, M.D., Commissioner of Health and William Van Note, Acting Commissioner of Labor; and, The State of New Jersey, Defendants below;

Joseph H. Rodriguez, Public Advocate of the State of New Jersey; New Jersey State Industrial Union Council, AFL-CIO (IUC); Citizen Action of New Jersey; Phila-

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* Petitioners New Jersey Chamber of Commerce; Chemical Industry Council of New Jersey; Chemical Specialties Manufacturers Association, Inc.; New Jersey Business and Industry Association have no parent companies, subsidiaries or affiliates. Pursuant to Rule 28.1, all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of all other petitioners are listed in the Appendix ("App.") at 649a-662a which was filed contemporaneously with this Petition.

delphia Area Project on Occupational Safety and Health (PHILAPOSH); New Jersey Environmental Lobby; New Jersey State Fireman's Mutual Benevolent Association (FMBA); International Association of Firefighters, New Jersey AFL-CIO (IAFF); Communication Workers of America, and Glass Workers International Union, AFL-CIO, Local 514-G; Pennsylvania Federation Brotherhood of Maintenance of Way Employees, AFL-CIO; Coalition Against Toxics; League of Conservation Voters (New Jersey); Student Public Interest Research Group of New Jersey (N.J. PIRG); Environmental Action (Washington, D.C.); League of Women Voters of New Jersey; Sierra Club (New Jersey); American Lung Association of New Jersey; New Jersey Tenants Organization (NJTO); New Jersey Association of County Health Officers; and, New Jersey Health Officers Association, Defendants-Intervenors below.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners New Jersey State Chamber of Commerce, *et al.*, respectfully pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered on February 28, 1989.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit filed on February 28, 1989 (App. 1a-24a) is reported at 868 F.2d 621.

The initial opinion of the United States District Court for the District of New Jersey (App. 25a-74a) is reported at 600 F. Supp. 606. The first opinion of the United States Court of Appeals for the Third Circuit (App. 85a-107a) is reported at 774 F.2d 587. The opinions of the United States District Court for the District of New Jersey after remand (App. 112a-149a) are not reported.

STATEMENT OF JURISDICTION

The opinion and judgment of the Circuit Court was filed on February 28, 1989. (App. 158a).

The judgment of the Circuit Court denying the Petition for Panel Rehearing and Rehearing in banc was entered on April 7, 1989. (App. 157a). The jurisdiction of this Court is based upon 28 U.S.C. Section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS

The Supremacy Clause, Article VI, clause 2 of the United States Constitution states:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

29 U.S.C. Section 667 is set forth at App. 168a-172a. 29 U.S.C. Section 667 (a)-(b) provides:

> (a) Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under

State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

29 U.S.C. Section 655 is set forth at App. 160a-168a.

The Occupational Safety and Health Administration's ("OSHA") Hazard Communication Standard, 48 Fed. Reg. 53340-53348 (Nov. 25, 1983), *codified at*, 29 C.F.R. Section 1910.1200, *et seq.* (1986), is set forth at App. 466a-502a. Section 1910.1200(a)(2) of the 1983 Standard provides:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating and communicating chemical hazards to employees in the manufacturing sector, and to preempt any state law pertaining to this subject. Any state which desires to assume responsibility in this area may only do so under the provisions of section 18 of the Occupational Safety and Health Act (29 U.S.C. 651, *et seq.*) which deals with state jurisdiction and state plans.

The Revised OSHA Hazard Communication Standard, 52 Fed. Reg. 31876-31886 (August 24, 1987), *codified as amended at*, 29 C.F.R. Section 1910.1200 (1988) is set forth at App. 589a-634a. Section 1910.1200 (a)(2) of the Revised Standard provides:

> This occupational safety and health standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to

preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject. Evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measure to employees, may include, for example, but is not limited to, provisions for: developing and maintaining a written hazard communication program for the workplace, including lists of hazardous chemicals present; labeling of containers of chemicals in the workplace, as well as of containers of chemicals being shipped to other workplaces; preparation and distribution of material safety data sheets to employees and down stream employers; and development and implementation of employee training programs regarding hazards of chemicals and protective measures. Under section 18 of the Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement relating to the issue addressed by this Federal Standard, except pursuant to a Federally-approved state plan.

The New Jersey Worker and Community Right to Know Act, N.J.S.A. 34:5A-1, *et seq.* (West 1988) ("New Jersey Act"), is set forth at App. 173a-210a. Section 14 of the New Jersey Act (emphasis added) provides:

(a) Every *employer* shall have until October 30, 1985 to take any action necessary to assure that every container at his facility containing a *hazardous* substance shall bear a label indicating the chemical name and Chemical Abstracts Service number of the *hazardous* substance or the trade secret registry number assigned to the *hazardous* substance. *Employers* may label containers in a research and development laboratory by means of a code or number system, if the code or number system will enable an *employee* to readily make a cross-reference to a *hazardous* substance fact sheet which will provide the *employee* with the chemical name and Chemical Abstracts Service number of the *hazardous* substance contained in the container, or the

trade secret registry number assigned to the *hazardous* substance. The code or number system shall be designed to allow the *employee* free and ready access at all times to the chemical name and Chemical Abstracts Service number of the *hazardous* substance in the container, shall be designed to allow the *employee* access to this information without the permission or assistance of management, and shall be available to the *employee* at close proximity to his specific job location or locations. *Employers* shall be required to label pipelines only at the valve or valves located at the point at which a hazardous substance enters a facility's pipeline system, and at normally operated valves, outlets, vents, drains, and sample connections designed to allow the release of a *hazardous* substance from the pipeline.

(b) Within two years of the effective date of this act, every *employer* shall take any action necessary to assure that every container at his facility bears a label indicating the chemical name and Chemical Abstracts Service number of the substance in the container, except as provided in subsection d. of this section, or the trade secret registry number assigned to the substance. *Employers* may label containers in a research and development laboratory by means of a code or number system, if the code or number system will enable an *employee* to readily make a cross-reference to documentary material retained on file by the *employer* at the facility which will provide the *employee* with the chemical name and Chemical Abstracts Service number of the substance contained in the container, except as provided in subsection d. of this section, or the trade secret registry number assigned to the substance. The code or number system shall be designed to allow the *employee* free and ready access at all times to the chemical name and Chemical Abstracts Service number of the substance in the container, shall be designed to allow the *employee* access to this information without the permission

or assistance of management, and shall be available to the *employee* at close proximity to his specific job location or locations. If a container contains a mixture, an *employer* shall be required to insure that the label identify the chemical names and Chemical Abstracts Service numbers, except as provided in subsection d. of this section, or the trade secret registry numbers, of the five most predominant substances contained in the mixture. The provisions of this subsection shall not apply to any substance constituting less than 1% of a mixture unless the substance is present at the facility in a aggregate amount of 500 pounds or more. *Employers* shall be required to label pipelines only at the valve or valves located at the point at which a substance enters a facility's pipeline system, and at normally operated valves, outlets, vents, drains and sample connections designed to allow the release of a substance from the pipeline. One year after the effective date of this act the Department of Health shall establish criteria for containers which, because of the finished and durable characteristics of their contents, shall be exempt from the provision of this subsection. These standards shall be consistent with the intent of this subsection to provide for the labeling of every container which may contain a substance which is *potentially hazardous.*

STATEMENT OF THE CASE

In the Occupational Safety and Health Act of 1970, 29 U.S.C. Section 651, *et seq.* ("the OSH Act"), Congress directed OSHA to promulgate uniform, national occupational safety and health standards, 29 U.S.C. Section 655; App. 160a-168a, and provided that any such federal standards would preempt state law relating to the same issue addressed in the federal Standard, unless the state obtains OSHA approval, 29 U.S.C. Section 667(b); 29 C.F.R. Section 1901.2. Pursuant to the OSH Act, OSHA promul-

gated the Hazard Communication Standard [1] which addresses comprehensively the issue of evaluating the potential hazards of chemicals and communicating information concerning these hazards to employees through provisions including in-plant labeling and employee training. 29 C.F.R. Section 1910.1200 (a) (2). The workplace portion of the New Jersey Act also addresses this same issue through provisions including in-plant labeling and employee training. N.J.S.A. 34:5A-13, 14; App. 189a-193a. New Jersey has not obtained OSHA approval for any of the provisions of the New Jersey Act as required by Section 18 of the OSH Act.

Petitioners include trade associations and employers subject to the requirements of the OSHA Hazard Communication Standard and the New Jersey Act. They filed suit in the U.S. District Court for the District of New Jersey requesting declaratory judgment that the New Jersey Act is preempted and that New Jersey officials be enjoined from enforcing the New Jersey Act against petitioners until the state officials submit the New Jersey Act for OSHA approval in accordance with the provisions of the OSH Act. The District Court had jurisdiction under 28 U.S.C. Section 1331. The Court of Appeals had jurisdiction under 28 U.S.C. Section 1291.

OSHA HAZARD COMMUNICATION STANDARD

A. The 1983 Standard.

On November 25, 1983, OSHA published the 1983 Standard which requires manufacturing sector employers [2] to implement comprehensive hazard communication pro-

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[1] Unless otherwise indicated, Petitioner will use the term Hazard Communication Standard to refer to both the 1983 Standard and the Revised Standard.

[2] Manufacturing sector employers are those which are included in Standard Industrial Classification ("SIC") Codes 20-39, 29 C.F.R. 1910.1200(b)(1); App. 467a.

grams. 29 C.F.R. Section 1910.1200 (b); App. 467a. These integrated programs require the evaluation of all chemicals produced or imported into the United States, development of Material Safety Data Sheets ("MSDS"), application of container labeling, and implementation of employee education and training programs regarding workplace hazards. *Id.* Section 1200(a)(1); App. 466a-467a.

Chemical manufacturers and importers must evaluate *all* chemicals produced in their workplaces or imported by them to determine if they are hazardous as defined by federal criteria. *Id.* Section 1200(d); App. 476a-478a. They must develop MSDS's, containing comprehensive chemical identity and hazard information, and transmit them to employer-purchasers for all hazardous chemicals in their workplace. *Id.* Section 1910.1200(g); App. 481a-485a. These employer-purchasers must insure that these MSDS's are readily accessible to all employees. *Id.* Section 1910.1200(g)(8); App. 484a.

Employers must insure that all in-plant containers have labels with: (1) language identifying the hazardous chemical; and (2) a word, picture or symbol communicating the chemical hazard. 29 C.F.R. Section 1910.1200(f)(4); App. 480a. The chemical identity language on the label must be keyed to the MSDS to permit employees to "cross-reference" the labels to the readily available MSDS's. *Id.* Section 1910.1200(g)(2)(i), (f)(1)(i); App. 481a, 479a; *see* 48 Fed. Reg. 53301 (Nov. 25, 1983); App. 306a-309a.

Employers are required to establish training programs for their employees exposed to hazardous chemicals in their work areas. *See* 29 C.F.R. Section 1910.1200(h); App. 485a-486a. In these programs, employees are informed of the (1) details of their employer's written hazard communication program; (2) the physical and health hazards present in their work area; and (3) proper

precautionary measures, work practices and emergency procedures. *Id.*

B. Revised Standard.

On August 24, 1987, OSHA published amendments to the 1983 Standard, 52 Fed. Reg. 31876-31886 (August 24, 1987) ("Revised Standard"); App. 589a-634a. In the Revised Standard, OSHA (1) extended the scope of coverage for employers outside the manufacturing sector; and, (2) clarified that the issue addressed by this federal Standard specifically includes provisions for "labeling of containers of chemicals in the workplace. . . ." *See* 52 Fed. Reg. 31877 (August 24, 1987); App. 592a.

THE NEW JERSEY WORKER AND COMMUNITY RIGHT TO KNOW ACT

On August 29, 1983, the New Jersey Act was enacted. This state statute establishes a program to communicate information concerning hazardous substances in the workplace to employees, governmental officials and the public. N.J.S.A. 34:5A-2; App. 173a-174a. Information concerning workplace hazards is communicated to employees through in-plant labeling, workplace surveys and employee training programs. *Id.* Sections 5A-14, 7(a), 13; App. 191a-193a, 185a, 189a-190a. Information concerning environmental hazards is communicated to governmental officials and the public through environmental surveys. *Id.* Section 5A-7(b); App. 185a-186a. The New Jersey Act applies to both manufacturing sector and non-manufacturing sector employers. *Id.* Section 5A-3(h); App. 175a-176a.

The New Jersey Department of Health ("DOH") is charged with preparing a workplace hazardous substance list ("Workplace List") which must include (a) any substance regulated by OSHA under 29 C.F.R. Part 1910, Subpart Z; (b) any substance on the environmental haz-

ardous substance list; and, (c) any other substances which the DOH "determines pose a threat to the health or safety of an employee." *Id.* Section 5A-5(a) (1)-(3); App. 183a. The New Jersey Department of Environmental Protection ("DEP") is charged with preparing the environmental hazardous substance list. *Id.* Section 5A-4(a); App. 182a. All covered employers must complete the Workplace and Environmental Surveys, including detailed information regarding the chemicals and chemical mixtures present in their workplaces which are contained on the Workplace List. *Id.* Section 5A-7; App. 185a-186a. Upon receipt of the completed workplace survey, the DOH transmits to each employer the applicable Hazardous Substance Fact Sheet ("HSFS"), a technical document similar to the MSDS, developed by the DOH. *Id.* Section 5A-8(a); App. 186a. These fact sheets, plus the surveys, must be made available to employees, as well as to the community at large. *Id.* Section 5A-12; App. 189a.

Each employer must ensure that every container, including pipelines, at his facility containing a substance on the Workplace List bears a label indicating the chemical name and Chemical Abstracts Service ("CAS") number of the substance. *Id.* Section 5A-14(a). Eighteen months thereafter, employers must label every container at their facilities, regardless of whether or not they contain a hazardous substance, with the chemical name and CAS number of the substances therein. *Id.* Section 5A-14(b).

Employers must establish training programs designed; (1) to inform employees of the potential health risks associated with hazardous substances to which they are exposed during the course of their employment; and (2) to train them with proper procedures in handling these substances. *Id.* Section 5A-13(a); App. 189a-190a.

RULINGS BELOW

Petitioners moved in the United States District Court for the District of New Jersey for a declaration that the New Jersey Act was expressly preempted by the OSH Act and the 1983 Standard and an injunction against enforcement of the New Jersey Act until the state obtains OSHA approval. The District Court held that the entire New Jersey Act, including the requirements for in-plant labeling, employer completion of workplace surveys and employee training programs was expressly preempted in the manufacturing sector. *New Jersey State Chamber of Commerce v. Hughey*, 600 F. Supp. 606, 618, 622 (D.N.J. 1985).

On appeal, the Third Circuit held that the employer's obligation to complete workplace surveys and to conduct employee training was expressly preempted. *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587, 595 (3d Cir. 1985) ("*Hughey I*"). The Court also held that the in-plant labeling scheme of Section 14 of the New Jersey Act was expressly preempted except for the labeling of environmental hazards. *Id.* at 595-96. Interpreting OSH Act Section 18(b), the Court ruled that express preemption extends only to those provisions of the New Jersey Act which have as their "primary purpose" the promotion of occupational safety and health. *Id.* Determining that the labeling of environmental hazards did not have this "primary purpose," the Court excluded this labeling requirement from express preemption and remanded to the District Court for a determination as to whether imposition of environmental hazard labeling in the manufacturing sector was impliedly preempted. *Id.* at 595, 598.

On remand, the District Court concluded that labeling of environmental hazards under Section 14(a) was not impliedly preempted. App. 145a. Finding that the Third Circuit in *Hughey I* had overlooked whether the labeling

of all containers under Section 14(b) was expressly preempted, the District Court further ruled that this in-plant labeling requirement was neither expressly nor impliedly preempted. App. 122a-123a; 145a. Judge Debevoise also ruled that *Hughey I* precluded him from addressing the amendments in the preemption language in the Revised Standard which was promulgated by OSHA after *Hughey I*. App. 123a-124a. The Third Circuit affirmed this final judgment after remand, *New Jersey State Chamber of Commerce v. Hughey*, 868 F.2d 621 (3d Cir. 1989) ("*Hughey II*"), concluding that Judge Debevoise's finding that Section 14 was not impliedly preempted was not clearly erroneous. The Court also ruled it was precluded from addressing the issue of express preemption of labeling of all containers, since the prior panel in *Hughey I*, had specifically ruled that Section 14(b) was *not* expressly preempted. The petition for rehearing and rehearing *in banc* was denied. App. 157a.

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW, THE PREEMPTIVE EFFECT OF OSH ACT SECTION 18 UPON STATE LAWS WITH PURPOSES OTHER THAN PROMOTING OCCUPATIONAL SAFETY AND HEALTH, IN A MATTER CONFLICTING WITH CONGRESSIONAL INTENT AND THE APPLICABLE DECISIONS OF THIS COURT.

This appeal presents an increasingly important question of federal law—the preemptive effect of Section 18 of the OSH Act upon state regulation of an issue addressed in an OSH Act Section 6 Standard when the state alleges a purpose for the regulation in addition to the promotion of occupational safety and health. Section 18(a) precludes any state agency from asserting jurisdiction over any occupational safety or health issue with respect to which a federal Standard has been issued under

Section 6 of the OSH Act. 29 U.S.C. Section 667(a); 29 C.F.R. Section 1901.2. Section 18(b) provides for recapture of state jurisdiction over an issue addressed by an OSHA Standard, but only after complying with OSHA's state plan review procedure. 29 U.S.C. Section 667(b). OSHA addressed the issue of evaluating workplace chemical hazards and communicating information about those hazards to employees in the 1983 Standard. 29 C.F.R. 1910.1200(a)(2) (1986). The issue was further defined in the Revised Standard to specifically include "labeling of containers of chemicals in the workplace. . . ." *Id.* (1988). Both the 1983 and Revised Standards contain express preemption provisions which preclude states from adopting or enforcing any regulation which pertains or relates to this issue, except pursuant to a federally approved state plan. 29 C.F.R. Section 1910.1200 (a)(2). The state statute under challenge here is Section 14 of the New Jersey Act. N.J.S.A. 34:5A-14. Section 14(a) provides for the in-plant labeling of containers of hazardous chemicals. Section 14(b) provides for the in-plant labeling, eighteen (18) months thereafter, of all containers of chemicals including nonhazardous substances. Although this state labeling regulation clearly relates to the issue of hazard communication through workplace labeling, the New Jersey Act has never been approved in an OSHA review procedure under Section 18 of the OSH Act.

The resolution of this appeal will directly affect the continued viability of the OSHA review procedure. If the decision of the Third Circuit is allowed to stand, states can evade preemption and OSHA review merely by claiming a purpose for their legislation other than promoting occupational safety and health. Such evasion directly conflicts with the intent of Congress as expressed in the OSH Act and the precedents of this Court.

A. The Court of Appeals decision clearly conflicts with this Court's preemption precedents by allowing State, rather than Federal, legislative intent determine the scope of express preemption.

The Supremacy Clause authorizes Congress to enact laws that preempt otherwise valid state legislation. U.S. Const. art. VI, cl. 2. Whether this preemptive power has been exercised depends exclusively upon Congressional intent as expressed in the terms of a federal statute, *Exxon Corp. v. Hunt*, 475 U.S. 355, 362 (1986); *Jones v. Rath Packing Co.*, 430 U.S. 519, 528-32, *reh. denied*, 431 U.S. 925 (1977), or through the actions of an administrative agency acting within the scope of its delegated authority, *City of New York v. Federal Communications Commission*, 108 S.Ct. 1637, 1642 (1988); *Capitol Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984); *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 151-52 (1982); *Napier v. Atlantic Coast L.R.R. Co.*, 272 U.S. 605, 612-13 (1926).

The express language of the OSH Act, the 1983 Standard and the Revised Standard establish the scope of federal preemption in the case *sub judice*. Read together, OSH Act Sections 18(a) and 18(b) expressly preempt state regulations "relating to" an "issue" addressed in a standard promulgated under OSH Act Section 6 until the state receives federal approval. 29 U.S.C. Section 667 (a)-(b), *see United Steelworkers of America v. Auchter*, 763 F.2d 728, 735 (3d Cir. 1985). Thus, the scope of preemption under OSH Act Section 18 is determined by the scope of the issue addressed by OSHA in a Section 6 Standard.

There is no question that OSHA in the 1983 Standard and the Revised Standard intended to preempt any state or local law relating to the issue addressed therein, which includes the labeling of containers of chemicals in the workplace. The preemption clause in the Revised Standard, which under *Fusari v. Steinberg*, 419 U.S. 379, 387

(1975), *reh. denied*, 420 U.S. 955 (1975), was controlling on the Third Circuit at the time of its decision in *Hughey II*, precluded any state law relating to the issue of the in-plant labeling of containers of chemicals. 29 C.F.R. Section 1910.1200(a)(2) (1988). It stated that:

> "[t]his Occupational Safety and Health Standard is intended to address comprehensively the issue of evaluating the potential hazards of chemicals, and communicating information concerning hazards and appropriate protective measures to employees, and to preempt any legal requirements of a state, or political subdivision of a state, pertaining to the subject. . . . Under Section 18 of the [OSH] Act, no state or political subdivision of a state may adopt or enforce, through any court or agency, any requirement *relating to* the issue addressed by this federal Standard, except pursuant to a federally-approved state plan."

Id. (emphasis added). The issue addressed by the Revised Standard was specifically defined to include "labeling of containers of chemicals in the workplace . . . ." *Id.* Since federal preemptive intent is expressed in this administrative standard, the only inquiry remaining is whether OSHA was legally authorized [3] to enact this express preemption provision. *See City of New York*, 108 S.Ct. at 1642; *Crisp*, 467 U.S. at 700.

Congressional authorization for OSHA's preemptive mandate is found in Subsections 18(a) and (b) of the

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[3] OSH Act Section 6(f) provides the procedural mechanism for challenging the validity of an OSHA Standard. 29 U.S.C. Section 655(f). The Secretary of Labor is a necessary party to these challenges which must be filed in the Court of Appeals no later than sixty (60) days after OSHA promulgates the Standard. *Id.* In Section 6(f) challenge to the 1983 Standard, New Jersey did not dispute that OSHA acted within the scope of its delegated authority in promulgating the in-plant labeling and express preemption provisions of the 1983 Standard. *See Auchter*, 763 F.2d at 736. Hence, these issues should have not been addressed in this matter. *Cf. R.S.R. Corp. v. Donovan*, 747 F.2d 294, 302 (5th Cir. 1984).

OSH Act which would preempt state and local laws even without the express preemption language contained in the Standard. *See United Steelworkers of America v. Auchter*, 763 F.2d 728, 735 (3d Cir. 1985); 29 C.F.R. Section 1901.2. Additionally, Congress specifically charged OSHA with the duty of determining the appropriate form of labels warning of hazards in the workplace. More specifically, Congress mandated that OSHA in all Section 6 Standards "shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed. . . ." 29 U.S.C. Section 655(b)(7); App. 165a.

Noting that state and local right to know laws "are consistent in their inconsistency", 48 Fed. Reg. 53324 (Nov. 25, 1983); App. 406a-407a, OSHA concluded that "a *uniform* Federal hazard communication standard is the best method to ensure that. . ." information regarding the chemical hazards employees are exposed to in the workplace is provided to them. 52 Fed. Reg. 31858 (Aug. 24, 1987) (emphasis added); App. 527a; *Accord* 48 Fed. Reg. 53281-84 (Nov. 25, 1983); App. 224a-226a, 235a-237a. Thus, there is no question that OSHA acted within the scope of its delegated authority in expressly preempting state laws which relate to the issue of communicating hazards to employees through provisions for labeling of containers of chemicals in the workplace. *See* 29 C.F.R. Section 1910.1200 (a)(2) (1988). *See City of New York*, 108 S. Ct. at 1642. Accordingly, New Jersey Act Section 14 is expressly preempted if it relates to this issue.

Even a cursory review of Section 14 of the New Jersey Act conclusively establishes that it is a provision for the communication of hazards to employees through the labeling of chemical in the workplace. *See* N.J.S.A. 34:5A-14. The "hazardous substances" labeled under Section 14(a) are defined as substances on the Workplace List which, in turn, are defined as all those substances which the

DOH determines "pose a threat to the health or safety of an employee." *Id.* Section 5A-5(a)(3); App. 183a. Both the Section 14(a) labeling of containers of hazardous substances and the Section 14(b) labeling of all containers limit the employer's obligations to its facility where access by non-employees is limited. Neither of these statutory provisions require that a container leaving the facility be labeled.

New Jersey's in-plant labeling scheme permits an employer in a research and development laboratory to label containers by means of a code or number system if an employee can readily make a cross-reference to a fact sheet which will provide the employee with the needed information. *Id.* Section 14(a); N.J.A.C. 8:59-5.3; App. 637a-638a. This code or number system may also be used for small containers so long as employees can cross-reference to the fact sheet. N.J.A.C. 8:59-5.1(i); App. 636a-637a. All labels are to be affixed to containers before the employees open them or within five (5) working days of their arrival, which ever is sooner. N.J.A.C. 8:59-5.1(d); App. 635a. Employers must label pipelines at normally *operated* valves, outlets, vents and drains. N.J.S.A. 34:5A-14. Labeling on petroleum process streams may be limited if the information is available to employees through fact sheets. *See* N.J.A.C. 8:59-5.5(e); App. 640a. Employers need not label containers if the substance therein is in a solid form which does not pose any acute or chronic health hazard to an employee exposed to it, N.J.A.C. 8:59-5.6(a)(1); App. 640a, or if it is in the same form as distributed to the general public and the employee's exposure is not significantly greater than a consumer's exposure, N.J.A.C. 8:59-5.6(a)(4); App. 641a. Thus, Section 14 of the New Jersey Act clearly communicates hazard information to employees through the labeling of containers of chemicals in the workplace—the precise issue addressed in the Hazard Communication Standard.

Improperly focusing upon the intent of the state legislature, the Court in *Hughey I* held that the in-plant labeling of substances which are designated as environmental hazards evaded express preemption because the Court determined its "primary purpose" to be other than promoting occupational safety and health. 774 F.2d at 595-96; *Accord Hughey II*, 868 F.2d at 627. By focusing upon the alleged purposes of state law, this decision directly conflicts with *Perez v. Campbell*, 402 U.S. 637 (1971), wherein this Court rejected as "aberrational" the doctrine that:

> [S]tate law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislators to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy—other than frustration of the federal objective—that would be tangentially furthered by the proposed state law.

Id. at 651-52, *cited with approval in, International Paper Co. v. Ouellette*, 479 U.S. 481, 499 n.19 (1987). Thus, by focusing on the purposes of state law, the court below departed from this Court's well established analysis which focuses upon the preemptive intent as expressed in the controlling federal statute or administrative agency action.

B. This Appeal presents an important question of Federal law which is now ripe for review by this Court.

Seeking to "assure so far as possible every working man and woman in the Nation safe and healthful working conditions . . .", Congress authorized OSHA to promulgate national occupational safety and health standards in OSH Act Section 6. 29 U.S.C. Section 651(b)(3). When an OSH Act Section 6 Standard is in effect, OSHA

approval of a state plan is the exclusive alternative to express preemption. *See* 29 U.S.C. Section 667 (a)-(b); 52 Fed. Reg. 31860 (Aug. 24, 1987); App. 535a-536a. Hence, the preemptive effect of an OSH Act Section 6 standard provides the legal compulsion for states to comply with the OSH Act Section 18 state plan review procedure. The Court of Appeals' decisions effectively eliminates this compulsion by allowing states to evade preemption by asserting a purpose for their regulations other than promoting occupational safety and health. *See Hughey II*, 868 F.2d at 625; *Hughey I*, 774 F.2d at 595-96.

The crippling effect that such evasion has upon the OSH Act state plan review procedure is amply demonstrated by the conduct of New Jersey in the case *sub judice*. New Jersey has not obtained OSHA approval for the New Jersey Act. When New Jersey requested "informal" review by OSHA in November of 1984, the state was advised that the New Jersey Act would not satisfy the "at least as effective" requirement of OSH Act Section 18(c), 29 U.S.C. Section 667(c)(2). U.S. Dep't of Commerce, *Hazard Communication Standard Interpretations, Indexes, and Letters*, Record No. 2592, 326-329 (June 1986); App. 644a-648a. OSHA based this determination, *inter alia*, upon the absence in the New Jersey Act of any requirement that hazard warnings appear on in-plant container labels. *Id.* at 327; App. 646a.

Additionally, there are other significant differences in the New Jersey Act in that all chemical containers must be labeled; OSHA requires only containers of hazardous chemicals to be labeled. *See Hughey II*, 868 F.2d at 625. New Jersey requires that the five predominant substances contained in a mixture to be labeled while OSHA has no such requirements. New Jersey requires labels to include the chemical name and CAS Numbers; OSHA does not so limit the chemical identity terms on labels. *Id.*

Moreover, New Jersey requires labeling of pipelines, while OSHA does not.

In promulgating the Revised Standard, OSHA affirmatively rejected proposals requiring employers to include chemical names and CAS numbers on labels, to place labels on pipelines, and to comply with extensive labeling for nonhazardous substances and mixture ingredients. *See* 52 Fed. Reg. 31864 (Aug. 24, 1987); App. 550a-553a; 48 Fed. Reg. 53291-93, 53301-03, 53305, 53326-27 (Nov. 25, 1983); App. 264a, 271a, 274a, 305a-316a, 326a, 414a-418a; 47 Fed. Reg. 12103, 12111-12 (March 29, 1982); App. 211a-216a. Thus, the Third Circuit allowed New Jersey to effectively "second guess" not only OSHA's rejection of the New Jersey Act as an OSH Act Section 18 state plan, but also OSHA's rejection of the aforementioned labeling proposals. Moreover, the lower court's decision produces the anomalous result of requiring the twenty-five (25) states with OSHA approved plans to adopt a standard comparable to the Revised Standard and to obtain OSHA approval of such state standards, while other states, such as New Jersey, can entirely circumvent this review procedure. *See* 52 Fed. Reg. 31870 (Aug. 24, 1987); App. 524a.

Since the "primary purpose" test was based upon the Third Circuit's analysis of the language of OSH Act Section 18(b), *Hughey II*, 868 F.2d at 625; *Hughey I*, 774 F.2d at 592, the circumvention of the state plan review procedure is not limited to preemption by the Hazard Communication Standard, but rather extends to any federal Standard promulgated pursuant to OSH Act Section 6.

On March 23, 1987, this Court requested the Solicitor General to express the views of the United States concerning the petition for writ of certiorari filed in *Manufacturers Ass'n of Tri-County v. Knepper*, 480 U.S. 929 (1987). *Knepper* involved a preemption challenge to the

Pennsylvania Worker and Community Right to Know Act, Pa. Stat. Ann. Tit. 35, Sections 7201-7320 (Purdon Supp. 1986) ("Pennsylvania Act") based upon the OSH Act and the 1983 Standard. The Pennsylvania Act is substantially similar to, although not identical to the New Jersey Act. *See Manufacturers Ass'n of Tri-County v. Knepper*, 801 F.2d 130, 134 (3d Cir. 1986), *cert. denied*, 108 S.Ct. 66 (1987).

Maintaining that the "primary purpose" test was incorrect, the Solicitor General took the position that the Third Circuit erred in "concluding that the Hazard Communication Standard does not preempt application of state law provisions—such as the Pennsylvania statute's hazardous substance survey, labeling, and MSDS requirements—that are designed to communicate hazard information to both manufacturing employees and other persons." Brief for United States at 13, *Manufacturers Ass'n of Tri-County v. Knepper* (No. 86-1102). As the Solicitor General predicted, application of this incorrect test for preemption has caused confusion. For example, applying the "primary purpose" test, the Third Circuit invalidated the Pennsylvania Act's in-plant labeling provisions in *Knepper*, 801 F.2d at 140, *interpreting*, Pa. Stat. Ann. Tit. 35, Section 7306, but has now upheld similar in-plant labeling provisions of the New Jersey Act in *Hughey II*, 868 F.2d at 627, *interpreting*, N.J.S.A. 34:5A-14.

Although concluding that the Third Circuit's "primary purpose" test was incorrect, the Solicitor General took the position in *Knepper* that review by this Court was not warranted in September of 1987. Brief for United States at 14. This position was based upon the Solicitor General's expectation that promulgation of the Revised Standard would cause: (1) those states with the Right to Know laws in the workplace to obtain "state plan" approval by OSHA or to limit their statutes to non-occupational spheres; and (2) the Third Circuit to re-

consider the "primary purpose" test in subsequent decisions. *Id.* at 18. These expectations remain unrealized.

At that time, there were five states which imposed in-plant labeling requirements on employers without OSHA approval.[4] Since then, none of them have modified its statutes or regulations to delete the requirements or obtained OSHA approval for them. Foremost, among these, is New Jersey, whose in-plant labeling scheme conflicts the most with OSHA's.

The Third Circuit has not only reaffirmed its "primary purpose" analysis in *Hughey II*, 868 F.2d at 626-28, but also completely deleted the limited preemption for non-environmental workplace labeling found in *Hughey I*, 774 F.2d at 595-96. Requiring employers to label *all* in-plant containers, including those within the express preemption finding in *Hughey I*, the Third Circuit in *Hughey II* left any relief from this ruling to be sought in a higher court, 868 F.2d at 627.

Contrary to the Solicitor General's expectations, neither the voluntary actions of the states nor the Third Circuit's subsequent decision in *Hughey II* have obviated the necessity for review by this Court. Thus, this issue of national importance is now ripe for review.

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[4] *See* Illinois, Ill. Ann. Stat. Ch. 48, Para. 1408 (Smith-Hurd 1986 & 1988 Supp.); Maine, Me. Rev. Stat. Ann. Tit. 26 Section 1713 (1988 & West 1989 Supp.); Massachusetts, Mass. Gen. Law. Ann. Ch. 111F. Section 7 (1985 & 1989 Supp.); New Jersey, N.J.S.A. 34:5A-14 (West 1988); and Rhode Island, R.I. Gen. Laws Section 28-21-18 (1986 & 1989 Supp.). While the Rhode Island statute has not been approved by OSHA, *see* 29 C.F.R. Part 1952 (1988), the requirements of this statute appear to parallel the OSHA Communication Standard.

CONCLUSION

For the foregoing reasons, Petitioners pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this case.

Respectfully submitted,

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